1997

(396) 1-10-97 **UNPUBLISHED** In re Ricci Investment Company, 93B-23895, Judge Boulden.

The proponents of a confirmed chapter 11 plan objected to the fee application filed by the chapter 11 trustee's attorneys and raised issues regarding the chapter 11 trustee's business judgment versus the attorney for the trustee's legal judgment, whether certain tasks performed by the trustee's attorneys were beneficial to the estate, and the impact of a violation of Fed. R. Bankr. P. 3016(a) on the allowance of fees. Relying on *In re Curlew Valley Assoc.*, 14 B.R. 506 (Bankr. D. Utah 1981), the Court found that although in hindsight, some of the trustee's decisions may have appeared improvident or premature, the trustee's decisions were reasonable, made in good faith, and were within the scope of the trustee's authority under the Bankruptcy Code. Applying 11 U.S.C. § 330 as it existed prior to the Bankruptcy Reform Act of 1994, the Court determined benefit under *Rubner & Kutner, P.C. v. U.S. Trustee (In re Lederman Enters., Inc.)*, 997 F.2d 1321 (10th Cir. 1993) by looking at whether services rendered by the trustee's attorneys promoted the bankruptcy process in accordance with the Bankruptcy Code and Rules. The Court concluded that time spent by the trustee's attorneys to draft the trustee's disclosure statement and plan that were filed in violation of Fed. R. Bankr. P. 3016(a) and time spent by the trustee's attorneys on an escrow agreement that allowed a result contrary to that approved by the Court were not beneficial to the estate. The Court denied compensation for these services.

(397) 3-6-97 **UNPUBLISHED** Republic National Bank of New York vs RSH Ltd., et al. (In re Ben Lomond Suites, Ltd.), 96PC-2270, 96PC-2316, Judge Clark.

Motions for dismissal and remand are before the Court. The fact that a dispute may require an interpretation of a confirmed plan does not necessarily make the dispute a core proceeding. A

confirmed plan has characteristics of both a contract and a judgment. State courts are well qualified to adjudicate contract disputes and to enforce judgments. The removed adversary proceeding existed outside of bankruptcy and the adversary proceeding filed in this Court, which is nearly identical to the removed adversary, could exist outside of bankruptcy. The Court finds that the controversy before the Court is in the nature of a contract dispute which can be adjudicated in state court. Accordingly, neither the removed adversary proceeding nor the adversary proceeding is a core proceeding. The Court can find nothing in the adversary proceeding or the removed adversary proceeding that would affect the reorganized debtor's rights, liabilities, options or freedom of action in any way, nor can the Court find that this litigation will affect, in any conceivable way, the handling or administration of the bankruptcy estate. The Court finds that there is no bankruptcy estate to administer. The bankruptcy estate ceased to exist at the point when the transfer of estate property from the reorganized debtor to RSH became effective. The Court orders that adversary proceeding no. 96PC-2270 is dismissed for lack of jurisdiction, and orders that adversary proceeding no. 96PC-2316 is remanded to state court for the reason that this Court lacks jurisdiction to adjudicate the matter.

(398) 7-8-97 **UNPUBLISHED** In re Ricci Investment Company, Inland Oil Products, Inc., Monrovia Oil Products, Inc., and Salina Investment Company, Inc., Substantively Consolidated Case No. 93B-23895, Judge Boulden.

Chapter 11 trustee, his counsel and the trustee's accounting firm submitted their third and final supplemental fee applications seeking reimbursement for fees and costs related to the defense of their second fee applications. The trustee and his counsel had encountered significant opposition to their second fee application and the Court disallowed a portion of the fees requested in their second applications. The determination whether the fees requested in the supplemental fee applications is governed by Section 330 as it existed prior to the Bankruptcy Reform Act of 1994 and the Tenth Circuit case law interpreting Section 330. *See Rubner &*

Kutner, P.C. v. U.S. Trustee (In re Lederman Enters., Inc.), 997 F.2d 1321 (10th Cir. 1991) (benefit to the estate is threshold concern when determining eligibility for reimbursement of fees). The Court determined that trustee's counsel did not exercise reasonable discretion during the course of administering the assets of the estate and the time spent preparing and defending the previous fee application was disproportionate to the amount ultimately in dispute. The reasonableness and necessity of incurring fees to defend a prior fee application in comparison to the benefit to the estate entitled trustee's counsel to 4 percent of the total fee request. The Court awarded a collective 34 percent of the total amount requested by the trustee and the trustee's accounting firm because there was benefit to the estate for the trustee's defense against allegations that the trustee acted negligently because those allegations were subsequently found to be untrue. The Court further disallowed the applicants' request for payment of interest and collection costs on the fees previously approved by the Court.

(399) 10-3-97 **UNPUBLISHED** In re Hammond Computer, Inc., 96C-24958, Judge Clark.

The matter before the Court is the second and final application for fees filed by the debtor's attorney. Novell, Inc. objected to the application arguing that debtor's attorney's fees and costs associated with defending a motion to appoint a trustee were not beneficial to the estate under § 330 and that, as a professional appointed to represent the debtor-in-possession, debtor's attorney failed in his duty to the estate to see to it that certain avoiding actions were commenced against insiders of the debtor. The Court finds that the time spent on services and rates charged for the services are reasonable and that the services were necessary to the administration of the estate and were beneficial at the time at which the services were rendered.

1998

(400) 2-12-98 **APPEAL**

In re Bonneville Pacific Corp., 91A-27701 (Case numbers for purposes of appeal: 2:96-CV-572-B and 2:96-CV-573-B), Judge Thomas R. Brett, United States District Court.

See #386.

The Court affirms the bankruptcy court's disallowance of fees and costs incurred by S&W while employed as general counsel for the debtor as debtor in possession and reverses the bankruptcy court's disallowance of S&W's fees and costs while employed as special counsel to the trustee. (See Opinion #386.)

(401) 10-1-98 **PUBLISHED**

In re Eleva, Inc., 97C-22299, Judge Clark.

226 B.R. 123

Creditor, Chapter 7 debtor-employer's group health insurance carrier, filed motion for allowance of administrative expense for unpaid premiums for postpetition insurance coverage provided to debtor's employees. The bankruptcy court held that creditor was not entitled to administrative priority for its claim.

(402) 10-15-98 **UNPUBLISHED**

Duane H. Gillman, Trustee v. James Van Treese and Jason Van Treese (In re Northwest Publishing, Inc.), 97PB-2036, Judge Boulden.

Chapter 7 trustee brought this action against two of the debtor's officers and directors claiming corporate mismanagement, requesting an accounting, and seeking a determination that the debtor was defendants' alter ego. The court held that the proceeding was non-core but was related to the main case, and that the parties consented to entry of a final judgment. The court applied state law in analyzing the trustee's corporate mismanagement claim, holding that the presumption of good faith contained in the business judgment rule was overcome by the

defendants' gross negligence. The debtor was also determined to be the alter ego of the debtor's president.

(403) 12-17-98 **PUBLISHED**

Berdene D. Dennison vs Don L. Hammond (In re Don L. Hammond), 97PB-2227, Judge Boulden.

236 B.R. 751

Debtor's ex-spouse filed a nondischargeability action under 11 U.S.C. § 523(a)(5) and 11 U.S.C. § 523(a)(15). The court found the debt dischargeable under 11 U.S.C. § 523(a)(5) because the ex-spouse failed to prove by a preponderance of the evidence that the parties intended the debt to be in the nature of support at the time of the divorce decree. Because the court did not find that the parties intended the debt to be in the nature of support, it did not reach the issue of whether the substance of the debt was in the nature of support. *Sampson v. Sampson (In re Sampson)*, 997 F.2d 717, 723 (10th Cir. 1993). However, the court found the debt nondischargeable under 11 U.S.C. § 523(a)(15) because the debtor failed to meet his burden of proving either of the exceptions to nondischargeability under 11 U.S.C. § 523(a)(15)(A) or (B). At the time of trial, the debtor had the ability to make payments on the debt from income not reasonably necessary for the maintenance or support of the debtor or a dependent of the debtor. The court excluded contributions to the debtor's 401(k) plan and charitable contributions in making this determination. Reviewing the evidence presented under a totality of the circumstances analysis and as it specifically relates to the eleven factors set forth in *Hart v. Molino (In re Molino)*, 225 B.R. 904, 909 (6th Cir. BAP 1998), the court concluded that the debtor had not shown that discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to the ex-spouse.

1999

(404) 1-6-99 **UNPUBLISHED** In re Richard D. Cummins and Tawna R. Cummins, 97B-26970, Judge Boulden.

Chapter 13 trustee sought clarification of time allowed for responding to his motion to dismiss. The court recognized a conflict between Local Rules 2003-1(a), 2083-1(b), and 5005-1(b)(1) which allow a ten-day response time, and Federal Rules of Bankruptcy Procedure 1017(a) and 2002(a) which allow a twenty-day response time. When there is a conflict between the Local Rules and Federal Rules of Bankruptcy Procedure, the Federal Rules control. Accordingly, the response time to a motion to dismiss is twenty days unless otherwise ordered by the court.

(405) 2-8-99 **PUBLISHED** America First Credit Union v. Matthew Scott Gagle, et al., (In re Matthew and Lisa Gagle), 97PB-2386, Judge Boulden.

230 B.R. 174

Debtor disassembled and sold off all parts of debtor's truck which was subject to a security interest. Secured creditor brought § 523(a)(2)(A) action alleging fraudulent misrepresentation in obtaining the loan and § 523(a)(6) action alleging willful and malicious injury. The court looked to the Restatement of Torts for guidance on the meaning of both § 523(a)(2)(A) and § 523(a)(6). The creditor failed to establish its § 523(a)(2)(A) claim which was dismissed. The court relied on *Kawaauhau v. Geiger (In re Geiger),* 118 S.Ct. 974 (1998), and *Dorr, Bentley & Pecha, CPA's P.C. v. Pasek (In re Pasek),* 983 F.2d 1524 (10th Cir. 1993) in holding that "willful and malicious injury" requires a deliberate or intentional injury that is performed without justification or excuse. In a two part analysis, the court held there was no intent to injure the creditor because the debtor intended to repay the debt. However, the debt was held nondischargeable as the debtor intended to injure the creditor's property consisting of its security interest by disassembling and selling his truck, and did so without

justification or excuse. The court based the measure of damages and the disallowance of attorney's fees on a tort analysis, rather than relying upon the underlying contract.

(406) 3-3-99 **APPEAL** In re Wayne Allen Gamble, 98A-21285 (case number for appeal is 2:98CV497G), Judge Greene, U.S. District Court.

232 B.R. 799 Chapter 7 debtor brought action against towing company hired to repossess his vehicle, alleging violation of automatic stay. The bankruptcy court imposed sanctions for willful violation of automatic stay. Towing company appealed. The district court held that intentional violation of automatic stay was necessary for award of punitive damages. Judgment vacated and case remanded.

(407) 7-20-99 **PUBLISHED** In re Geneva Steel Company, 99C-21130, Judge Clark.

236 B.R. 770 Debtor's motion for authorization to implement a employee retention program is before the court. In view of the objection by the United Steelworkers of America, the court finds that to propose this retention program without first having discussed its provisions with the Steelworkers is not an example of good business judgment, especially when the continued existence of the business is in question. Granting the motion may jeopardize the continuing support of the Steelworkers in the reorganization process. To be acceptable to this court, the severance plan must contain a mitigation provision that reduces the amount payable in the event the executive obtains other employment during the six or nine month reimbursement period. The severance plan is unacceptable because of the adverse impact the provision could have on the administration of the case in chapter 7. Further, the court will construe the payment of the emergence bonus only in the event that a plan of reorganization is confirmed and not an chapter 11 liquidating plan. The motion is denied without prejudice. The debtor is granted leave to set a hearing on ten days notice for approval of a retention program consistent with this order.

(408) 7-27-99 **PUBLISHED** In re WIN Trucking, Inc., 98B-25814, Judge Boulden.

236 B.R. 774

Chapter 11 debtor elected to be treated as a small business but no party filed a plan within the 160-day time limit imposed by 11 U.S.C. § 1121(e). After filing an untimely plan, the debtor filed a withdrawal of its small business election. The court concludes that the debtor's failure to timely file its plan and its belated attempt to withdraw its small business election preclude confirmation of the plan under 11 U.S.C. § 1129(a)(1) and (2).

2000

(409) 2-4-00 **APPEAL**

Steven R. Bailey, Trustee, v. Big Sky Motor, Ltd. (In re Wayne R. Ogden), 98PA-2198, (case number for appeal is 2:99-CV-270B), Judge Benson, U.S. District Court.

The bankruptcy court held that Big Sky received a $300,000 preferential transfer from debtor, which the trustee was entitled to avoid and recover from Big Sky as the initial transferee. The district court finds that the bankruptcy court correctly determined that the trustee could avoid the $300,000 transfer to Big Sky under § 547(b) and recover the money from Big Sky under § 550(a)(1).

(410) 2-16-00 **UNPUBLISHED**

In re Donnie Lee Amos, 98B-32761, Judge Boulden.

"Gap period" attorneys fees incurred after the filing of a chapter 13 petition but before conversion to chapter 7 which are not allowed under § 330(a)(4)(B) will not be allowed under § 503(b)(1)(A). Applications for allowance of administrative expenses filed prior to conversion to chapter 7 are timely pursuant to Fed R. Bankr. P. 1019(c), and, to the extent allowed by the court, should be paid by the chapter 13 trustee from available § 1306(a)(2) funds. If there are more allowed chapter 13 administrative claims than available § 1306(a)(2) funds, the allowed § 503(b)(2) administrative claims should be prorated and paid from § 541 property after chapter 7 administrative expenses pursuant to § 726.

Procedure change: Parties seeking allowance of any chapter 13 administrative expense must timely file a request for payment of the administrative expense prior to conversion to chapter 7 and have that request resolved by a final order, or other order extending the period, within sixty days of the conversion, or the administrative expense claim will be deemed waived by the applicant.

(411) 4-13-00 **APPEAL**

Steven R. Bailey, Trustee, v. Orlando Nickerson and Rosemary Nickerson (In re Wayne R. Ogden), 98PA-2299 (case number for appeal is 2:00-CV-49K), Judge Kimball, U.S. District Court.

The bankruptcy court awarded summary judgment in favor of the trustee and against the Nickersons for $2ll,237.50 together with interest and held that the Nickersons were thereby the initial transferees pursuant to 11 U.S.C. § 550. The bankruptcy court found that the Nickersons must return the profits they derived from the Ponzi scheme (operated by the debtor) to the debtor's estate. The district court affirmed the bankruptcy court in its entirety.

(412) 4-14-00 **UNPUBLISHED**

Diane George v. Robert Lee Cevering (In re Robert Lee Cevering), 99PB-2022, Judge Boulden.

Debtor's ex-spouse filed a nondischargeability action under 11 U.S.C. §§ 523(a)(4), (a)(5), and (a)(15) seeking $50,000, an award of punitive damages and attorney fees. On the day of trial, the debtor stipulated that the $50,000 debt was nondischargeable under 11 U.S.C. § 523(a)(15). The court found that the debt was also nondischargeable under 11 U.S.C. § 523(a)(4) but declined to award punitive damages because the statute of limitations ran on any state law conversion claim prepetition and no provision of the Bankruptcy Code allowed punitive damages under the circumstances of the case. The court declined to award attorney fees finding there was no case law, contractual, or statutory basis. The plaintiff also sought a general denial of the debtor's discharge under 11 U.S.C. §§ 727(a)(2) and (a)(4)(A). The court denied the debtor's discharge under § 727(a)(4)(A) finding that the debtor knowingly and fraudulently made a material false oath.

(413) 5-18-00 **APPEAL**

In re Donald E. Armstrong v. Steven R. Bailey and Duane H. Gillman (In re Willow Brook Cottages, LLC), 99PC-2187, (case number for appeal is 2-99-CV-0725K), Judge Kimball, U.S. District Court.

After holding a hearing to show cause, the bankruptcy court held that Armstrong had violated the bankruptcy automatic stay provision, § 362, by filing his adversary proceeding without the court's permission. The bankruptcy court held him in contempt, awarded the trustee attorney's fees and punitive damages, and dismissed the adversary proceeding with prejudice. The review of the dismissal with prejudice for the alleged violation of the automatic stay was reviewed *de novo*. The factual determinations of the bankruptcy court as to the awarding of fees and damages were reviewed under an abuse of discretion standard. The district court ruled that the bankruptcy court properly dismissed Armstrong's action with prejudice for violating the stay and that it was acting within its discretion in awarding compensatory damages to a corporation. The district court determined that the punitive damage award is an abuse of discretion and that Armstrong's procedural defect does not merit the awarding of punitive damages based upon criminal contempt. The punitive damages award is reversed and the contempt charges are set aside.

(414) 7-21-00 **PUBLISHED**

In re W. Kerry Jackson, 99-33070, Judge Clark.

The issue before the court is the willful violation of the automatic stay and the failure of the creditor to turn over property of the estate. The court awarded debtor compensation but declined to award punitive damages because it believed that punitive damages were not necessary to deter similar conduct in the future.

(415) 8-24-00 **UNPUBLISHED** In re Bashar and Ouhoud A. Dabbas, 00-21217 GEC, Judge Clark.

The matter before the court is a motion to dismiss a chapter 7 bankruptcy case for substantial abuse under § 707(b). The bankruptcy court relied upon In re Stewart, 175 F.3d 796 (10th Cir. 1999) and its "totality of the circumstances" test to determine if substantial abuse exists. Under the totality of the circumstances test, the debtors can reduce expenses without being deprived of adequate food, clothing, shelter, or other necessities; therefore, unless the case is converted to another chapter within ten days, the case is dismissed for substantial abuse of the bankruptcy laws.

(416) 11-9-00 **PUBLISHED** In re Michael A. Parks and Theresa L. Parks, 00-27517JAB, Judge Boulden.

Trustee objected to chapter 7 debtor's exemption of funds accrued while participating in a 401(k) ERISA qualified pension plan where funds were available to debtor as a result of debtor's employment terminating prepetition. Because the terms of the plan provided that after termination of employment debtor had the absolute right to the funds, trustee argued the funds lost their anti-alienation characteristics as part of an ERISA qualified plan and were not exempt under Utah Code Ann. § 78-23-5(1)(a)(x). Debtor responded by arguing that because the funds remained in the plan until they were deposited into an IRA, postpetition, they remained exempt under either ERISA or state exemption statutes. The court cited *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078, 1082-83 (10th Cir. 1994)(en banc), *cert. denied*, 514 U.S. 1063 (1995), for the proposition that such funds are protected by anti-alienation provisions of ERISA § 206(d)(1), so long as they are within the fiduciary responsibility of private plan managers and not paid to or received by plan participants or beneficiaries. Therefore, the court concluded that the trustee's objection to exemption was overruled because the debtor's plan funds were not property of the estate.

(417) 11-22-00 **PUBLISHED** In re Husting Land & Development, Inc., 97B-20309, Judge Boulden.

Unsecured creditor entered into a postpetition construction agreement with debtor, a land developer, for the purpose of correcting defective work and completing improvements on debtor's sixty-one acre residential subdivision. Upon creditor's application for allowance of administrative expense, the trustee and secured creditors objected, arguing that the postpetition debt was not incurred in the ordinary course of the debtor's business pursuant to 11 U.S.C. § 364(a). The court concluded that the postpetition debt was not incurred in the ordinary course of business and, accordingly, creditor's claim could not be allowed as an administrative expense. The court first determined that the opinion testimony of creditor's expert witness was inadmissable because his methodology could not be proved under the test set forth in *Kuhmo Tire Company, Ltd. vs. Carmichael*, 526 U.S. 137 (1999). The court then applied the well-established "creditor expectation" test to determine that, given its scope and nature, this was not the type of transaction a reasonable creditor would expect the debtor to enter into in the ordinary course of its business. Specifically, when the debtor and creditor entered into the construction agreement, neither had a clear understanding of the amount of corrective work that would be necessary, nor was there any certainty as to the source of funds to repay the debt incurred. As such, this transaction was outside the ordinary course of the debtor's business, and creditors should have been given notice and an opportunity to be heard.

2001

(418) 1-9-01 **PUBLISHED**

Transworld Telecommunications, Inc. v. Pacific Mezzanine Fund, L.P., (In re Transworld Telecommunications, Inc.), 98PC-2089, Judge Clark.

The objections to the Bankruptcy Court's Proposed Findings of Fact, Conclusions of Law, and Judgment Pursuant to 28 U.S.C. § 157(c)(1) (included) came before the district court, Judge Stewart presiding. Affirmed.

(418a) 1-9-01 PUBLISHED

Transworld Telecommunications, Inc. v. Pacific Mezzanine Fund, L.P., (In re Transworld Telecommunications, Inc.), 98PC-2089, District Court Order on Proposed Findings of Fact, Conclusions of Law, and Judgment Pursuant to 28 U.S.C. §157(c)(1). Judge Stewart.

(419) 2-7-01 **PUBLISHED**

In re Geneva Steel Company, 99-21130, Judge Clark.

Order Allowing Reduced Fees and Expenses. The fourth fee application of The Blackstone Group, financial advisor to the debtor, came before the Court. Even though the advisor's appointment provided for a fixed fee, the Court adjusted downward the award of fees because the number of hours spent by the advisor went downward in subsequent fee periods. The advisor was entitled to recover, as part of its allowable expenses, a reasonable fee for legal services of law firm that it hired to defend its fee application, although law firm had never been appointed to serve as a professional in the case.